

REQUEST FOR COUNCIL ACTION

SUBJECT:

Proposed amendments to Title 1 ("Administration"), Chapter 12 ("Employee Discharge Appeal Board") in the 2009 City Code.

SUMMARY:

The experience of the most recent appeal handled by the Employee Discharge Appeal Board suggests needed amendments to the organizational and operational governance of the Board.

FISCAL IMPACT:

Staff believes there will be no adverse fiscal impact from the proposed text amendments. If the changes are made, savings can be expected in overtime compensation.

STAFF RECOMMENDATION:

Staff recommends APPROVAL of the proposed 2009 City Code amendments.

MOTION RECOMMENDED:

"I move that the City Council adopt and approve Ordinance 15-27, amending Title 1 "Administration", Chapter 12 ("Employee Discharge Appeal Board") in the 2009 City Code, all as set forth in the form of Ordinance attached to the Staff Report."

Roll Call Vote ☒ required. ☐ not required.

Reviewed by:

ARThorup

Robert Thorup
Deputy City Attorney

Recommended:

Bryce Haderlie

Bryce Haderlie
Interim City Manager

The Employee Discharge Appeal Board

Title 1, Chapter 12 of the 2009 City Code creates the City's Employee Discharge Appeal Board. This Board hears employee appeals of discharge, suspension or involuntary transfer decisions of their department heads. In addition to employee discharges resulting from the employee discipline process outlined in the Employee Handbook, discharges resulting from reductions in force (RIF) can also be appealed to the Board. The Board hears appeals *de novo*, which means "anew" and without regard to the decision of the department head. Witnesses are heard and documentary evidence is presented and received.

Importantly the Board's decision can be appealed to the Utah Court of Appeals. This is the only agency of the City with a direct appeal to the courts without a first stop at the City Council. This is pursuant to the requirements of the Utah Code.

Membership

Currently two employees are elected to serve on the Board, one Department Head is appointed by the City Manager, and two members of the City Council are appointed by the City Council. It is proposed that the City Council members be removed from the Board, and that the employee members and the Department Head members each get one more seat.

The recent experience in the Finlayson case shows the wisdom of these changes. Of the two Council Members appointed to the Board, only one was able to consistently attend the hearings. The one Council Member who regularly attended required that the hearings take place after regular business hours to accommodate his full time job. This "after hours" hearing process resulted in hearings lasting well into the early morning hours, which was a physical burden on witnesses, the employee and the Staff, as well as the other members of the Board.

Council Members have great demands on their time and, in most cases, are holding down full time jobs at the same time. Staff believes that Council Members should be spared from Board service for their sake as well as for the sake of the other participants. Moreover having more employees on the Board gives a better sense of review by peers, and a feeling of participation by the employees generally, while also increasing the roles and participation of management. These changes will also reduce the compensatory time and overtime costs of these hearings, given that all hearings could be scheduled during the business day.

Speeding Up the Process

Currently the City Code allows Board appeals to take an undetermined amount of time. The recent Finlayson appeal covered a six-month period, and was full of delays and surprises with respect to witness lists and exhibits. The proposed amendments create a 120 day maximum period between the start of the appeal and the date of the hearing. This could happen as quickly as 90 days. There are specific dates provided for the sharing of witness lists and exhibits.

In connection with reductions in force (RIF) actions, times are shortened even more, allowing the City to have a rapid resolution of a RIF appeal, and limiting the RIF appeal to only certain issues.

Empowering the Board

The amendments empower the Board to conduct its hearings efficiently. The Board will now have the ability to limit the amount of time the hearing will take, within reason, and thus limiting the amount of time allowed for each witness.

Increasing the Scope of Review

In addition to the current scope of review, whether the discharge, suspension or involuntary transfer was supported by a justifiable cause, the amendments allow an employee to appeal if the discharge, suspension or involuntary transfer was not proportional to the offenses charged and to appeal if the discharge, suspension or involuntary transfer is harsher than discipline meted out to other employees for the same or similar offense. This change empowers employees to seek review on all issues now being reviewed at the Court of Appeals.

Allowing the City to Go First

The Finlayson case showed how a hearing could be made more complicated and lengthy if the appealing employee is allowed to go first in presenting evidence. The amendments change the order to call upon the City to go first. The employee still has the burden of proof, and will be allowed to give opening and closing statements first and to allow for rebuttal time. These changes will streamline the hearing aid the Board in understanding the issues in the case.

Outside Legal Counsel for the Board

In the Finlayson appeal, the City Attorney undertook to obtain an attorney to advise the Board during the hearing. This was important given the large amount of legal wrangling that took place, and this decision freed the City Attorney's office to represent the City at the hearing. The amendments require the City Attorney to arrange for such legal help for the Board.

THE CITY OF WEST JORDAN, UTAH

A Municipal Corporation

ORDINANCE NO. 15-27

[EMPLOYEE DISCHARGE APPEAL BOARD]

AN ORDINANCE AMENDING TITLE 1, "ADMINISTRATION."

WHEREAS, the City of West Jordan adopted a City Code in 2009, for the purpose of carrying into effect and discharging all powers and duties conferred by law upon the city and its officers, employees and inhabitants, and to provide for the safety, preserve the health, promote the prosperity, improve the morals, peace, good order, comfort and convenience of the city and its inhabitants, and to protect property in the city; and

WHEREAS, the West Jordan City Council finds and determines that the purpose of the 2009 City Code, and the public health and welfare, will best be reached by the adoption of the following amendments to Title 1, Chapter 12 of the 2009 City Code.

NOW THEREFORE, IT IS ORDAINED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF WEST JORDAN, UTAH:

Section 1. Title 1, Chapter 12, Sections 1 and 2 of the 2009 City Code shall hereafter read as follows:

1-12-1: APPOINTMENT OF MEMBERS; VACANCIES; TERM OF OFFICE AND RECUSAL:

- A. Membership: The employee discharge appeal board shall consist of five (5) members. Three (3) members shall be chosen by and from among the employees of the city other than department heads, and two members shall be department heads. The department head members shall be selected by the city manager.
- B. Election Of Employee Members: At least thirty (30) calendar days prior to the first Tuesday of even numbered calendar years, the city manager shall cause all of the full time nonprobationary employees of the city to be notified that anyone interested in serving on the appeal board must submit his/her name to the city clerk-recorder no later than December 15. Thereafter, the city manager shall arrange that the full time nonprobationary employees of the city shall vote by secret ballot, from among those employees who applied, for three (3) full time nonprobationary employees to serve on the appeal board for a two-(2) year term. The vote may be by paper ballot or through electronic means. The city clerk-recorder will count the ballots. The three (3) employees receiving the highest number of votes in the election shall serve as the employee members of the appeal board. If any employee member becomes disqualified or unable to serve during his/her term, the next highest vote getter would be appointed to the remaining term.

- C. Management Members: During the month of January of even numbered years, the city manager shall designate in writing two (2) department heads to serve on the appeal board for a two-(2) year term. The city manager may also designate one or more department heads as alternate members of the appeal board, who will serve in the absence, inability or disqualification of a department head member.
- D. Compensation: Members of the appeal board shall receive no compensation for their services; however, said members shall receive their regular city salary and benefits during the time they perform duties on the appeal board. If hearings are conducted after regular business hours, or if a hearing carries over into after-regular-business hours, the members of the appeal board will be awarded comp time on an hour and one half for an hour basis.
- E. Terms: The terms of the appeal board member shall be for a period of two (2) years instead of the regular three-(3) year term provided in section 2-1-4C of this code. Otherwise section 2-1-4C shall apply to the appeal board except as expressly provided otherwise by this chapter.
- F. Eligibility For Reappointment: All appeal board members shall be eligible for reappointment or reelection.
- G. Quorum; Voting:
1. The appeal board shall not take any action on any matter, unless a quorum shall be present.
 2. Three (3) members of the appeal board in attendance at any meeting shall constitute a quorum; however, at least one department head member must be in attendance in order for a quorum to be present.
 3. Three (3) affirmative votes are needed to overturn or affirm a department decision pending before the appeal board.
 4. A member of the appeal board who fails to attend and participate in any part of a hearing on a particular matter may not vote on the decision of the board on that matter.
- H. Voting Right; Selecting Chairperson; Training:
1. All members of the appeal board are voting members.
 2. At a meeting held within 30 business days after being organized, and sooner if required by a pending case, and scheduled by the city manager or a designee, the board shall choose from among their body one member to act as chairperson during that term of the board. The chairperson shall act to assure the orderly conduct of all proceedings and shall not forfeit any right, duty or privilege, as a result of being chosen to act as chairperson.

- I. Within 30 business days following the constitution of the board as provided above, and within 30 business days of any appointment of a replacement member during the term of an appeal board, the city attorney shall provide training to the members of the appeal board as to the powers and requirements of this chapter 12. (2001 Code § 2-6-201; amd. Ord. 10-02, 1-27-2010; Ord. 15-____, 09-09-2015)

1-12-2: APPEAL PROCEDURE:

A. Commencing And Processing An Appeal:

1. An appeal of a discharge, suspension or involuntary transfer within the jurisdiction of the appeal board may be commenced by the affected employee filing written notice of the appeal with the city clerk-recorder within ten (10) calendar days after the employee receives notice of the final disposition of the city's internal disciplinary procedure for disciplinary matters; and within 48 hours after the employee receives notice of being discharged, or involuntarily transferred in a reduction in force.
2. The employee's written notice of appeal must include:
 - a. The employee's address;
 - b. A detailed challenge to the department head's final decision, including facts and argument why the appeal should be decided in favor of the appealing employee, and citing pertinent law and fact;
 - c. A copy of the department head's final determination; and
3. The failure of an employee to timely submit this required information shall forfeit any appeal rights of the employee.
4. The department head involved in the matter may not respond to the notice of appeal except as otherwise provided in this section.
5. Upon the filing of the written notice of appeal, the city clerk-recorder shall promptly refer a copy of the notice of appeal to the members of the appeal board and to the department head involved in the matter.
6. Upon receipt of the written notice of appeal, the appeal board shall set a hearing date and provide written notification of the hearing date, including time and place of the hearing to the employee, the department head involved in the matter, the city attorney and the city manager.
7. The department head involved in the matter must file with the appeal board a disposition statement setting forth the facts and circumstances supporting the discharge, transfer, or suspension.

a. Within ten (10) business days of receiving the notice of appeal (in appeals of disciplinary matters); or

b. Within 48 hours of receiving the notice of appeal, a disposition statement setting forth the facts and circumstances supporting discharge or involuntary transfer as part of a reduction in force.

The department head involved in the matter shall mail a copy of the disposition statement to the employee or the employee's designated legal counsel at the address specified in the notice of appeal. No reply to the determination statement by the appellant is permitted.

8. The appeal board, acting through the city clerk-recorder, shall provide notice of the date and time for the appeal hearing in any matter to the department head involved in the matter and to the appellant in writing, which may be by electronic means. The appeal hearing in any matter shall take place no later than 120 business days and no sooner than 90 business days following service of the disposition statement.

9. The city attorney shall arrange for legal counsel to be provided to the appeal board to assist the appeal board in resolving any pre-hearing matters and to advise the appeal board during and after any appeal hearing. This legal counsel shall not be regularly employed by the city attorney's office.

B. Jurisdiction And Authority Of Appeal Board:

1. "At will" employees and employees covered by Utah Code section 10-3-1105 or its successor do not have the right to an appeal under this chapter.

2. An employee must exhaust the city's internal disciplinary procedure before commencing an appeal to the appeal board (in appeals for disciplinary matters).

3. The appeal board has jurisdiction to hold a hearing and to take and receive evidence in reviewing *de novo* a final department decision:

a. To discharge an employee;

b. To suspend an employee for more than two (2) business days without pay;

or

c. To involuntarily transfer an employee from one position to another with less remuneration.

4. For appeals of disciplinary matters, the appeal board shall determine only if there was sufficient cause for the discharge, suspension or involuntary transfer of the employee, and whether the discipline assessed was proportional to the offenses charged, including whether the appellant has been disciplined more harshly than other employees recently charged with the same offenses by the department.

5. In appeals of a discharge or involuntary transfer resulting from a reduction in force, the appeal board shall determine if the procedures set out in the employee handbook, or elsewhere, for selecting the employee for discharge or transfer as part of a reduction in force were properly followed by the department head or city manager. The appeal board expressly has no jurisdiction to re-examine the decision to implement a reduction in force or the size and scope of a reduction in force.

6. Subpoenas: The appeal board shall have the power to subpoena witnesses and compel the production of books, papers and any other evidence, as may be pertinent and relevant to any investigation and a fair hearing or decision, in the possession of third parties. Subpoenas must be requested no later than thirty (30) business days following service of the disposition statement.

7. The board may deliberate in a closed session to consider rulings on requests for subpoena, to consider and vote on its decision on the merits following a hearing, and to consider other pre-hearing motions or rulings.

C. Recusal For Conflict Of Interest: Any member of the appeal board who is simultaneously employed within the same department for which the appealing employee works, or who shall be related to the appealing employee through blood, adoption or marriage, may not participate as a member of the appeal board considering such appeal. The member so disqualified may be replaced by an alternate for that appeal, as provided in section 1-12-1B for employee members and in section 1-12-1C for department head members.

D. Procedure For Conducting Appeal Hearings:

1. The appellant shall serve on the department head involved in the matter its witness list and may serve a request for production of documents within 30 calendar days following service of the disposition statement. The department head involved in the matter shall provide its witness list and any requested documents to appellant, or otherwise respond, within 30 business days following receipt of the appellant's witness list and any request for production of documents.

2. The department head involved in the matter shall arrange for any city employees appearing on appellant's witness list to be available to testify at the hearing.

3. The appeal board will promptly hear and decide any motions in connection with pre-hearing matters, and may adjust the hearing schedule as needed to accommodate the issues of a particular case.

4. Open Hearings: Appeal hearings will be open to the public unless a closed meeting is requested in writing by the appealing employee and consented to by the department head involved in the matter, or is otherwise permitted by this code.

5. Record; Right To Transcript: The appeal board hearings shall be recorded electronically. If a written record or transcript of any proceeding of the appeal board is requested, the party requesting any such record or transcript shall provide for the preparation of such record or transcript, including the payment of all involved costs.

6. Employee's Rights: The employee shall be entitled to appear in person and be heard; be represented by legal counsel duly admitted to the bar of the Utah Supreme Court, at the expense of the employee; have a public hearing; confront the witness whose testimony is to be considered; and examine the evidence to be considered by the appeal board.

7. Burden Of Proof: The employee shall have the burden of proving by a preponderance of the evidence that the department head involved in the matter imposed the discharge, suspension or involuntary transfer without justifiable cause or that the discipline assessed was not proportional to the offenses charged, including whether the appellant has been disciplined more harshly than other employees recently charged with the same offenses by the department.

8. Default: If either party fails to appear and defend or prosecute the action, the appeal board may:

a. Default the action against the nonappearing party; or

b. Make its own investigation and determination of the matter in the absence of the defaulting party and enter orders accordingly.

9. Interim And Summary Orders: Upon written request of a party or on its own motion, the appeal board may make such orders as it deems equitable and for good cause shown.

10. Informal Procedure: The appeal board may conduct the hearing informally without following technical or procedural rules regarding the presentation of evidence or witnesses as follows:

a. The appellant to make an opening statement.

b. The city to make an opening statement.

c. The city to present evidence and witnesses, subject to cross examination by the appellant.

d. The appellant to present evidence and witnesses, subject to cross examination by the city.

e. The city to present further evidence in rebuttal.

f. The appellant, then the city to make closing arguments.

g. The appellant to make rebuttal argument.

h. The appeal board may exclude from the hearing any witnesses who have not yet given testimony in the appeal before the appeal board.

i. The appeal board is not bound by the rules of evidence followed by the courts and may hear any evidence it determines relevant to the matter.

j. Every witness shall be first sworn to testify truthfully as provided by law. The oaths are administered at the direction of the appeal board.

k. The appeal board may modify these procedures at the hearing as may be equitable and conducive to a determination of the issues. The appeal board may declare time limits on the presentation of evidence and argument, provided that the appeal board communicate such time limits in writing to the parties at least 30 business days prior to the commencement of the appeal hearing.

11. Decision:

a. Each decision of the appeal board shall be by secret ballot, and certified in writing to the city clerk-recorder within fifteen (15) business days from the date on which the hearing on the merits of an appeal is concluded. If the city and the employee agree, the appeal board may extend the fifteen (15) business day period to a maximum of sixty (60) business days for good cause.

b. Notwithstanding subsection a., appeals filed in connection with a reduction in force must be processed rapidly in the best interests of the employees involved. In such cases the appeal board must report its decision within 24 hours of the end of the hearing.

The appeal board shall prepare written findings of fact and conclusions to support its decision.

If the appeal board finds in favor of the employee, the board shall provide that the employee shall receive, except as may have been previously agreed between the parties:

a. His/her salary for the period of time during which the employee is discharged or suspended without pay; or

b. Any deficiency in salary for the period during which the employee was transferred to a position of less remuneration.

E. Certify Final Decision To Parties: The city clerk-recorder shall certify written copies of the appeal board's decision to the employee, the department head from whose order the appeal was taken, the city manager and the city attorney within ten (10) business days after receiving the decision.

F. Court Of Appeals: The final action or decision of the appeal board may be reviewed by the Utah court of appeals in accordance with Utah code section 10-3-1106(6) or any successor provision, and in accordance with the Utah Rules of Appellate Procedure. (2001 Code § 2-6-202; amd. Ord. 10-02, 1-27-2010; Ord. 15-____, 09-09-2015)

CITY CLERK/RECORDER'S CERTIFICATE OF PUBLICATION

I, Melanie S. Briggs, certify that I am the City Clerk/Recorder of the City of West Jordan, Utah, and that the foregoing ordinance was published in the Legal Section, of the Salt Lake Tribune, on the _____ day of _____, 2015, pursuant to Utah Code Annotated, 10-3-711.

MELANIE S. BRIGGS, MMC
City Clerk/Recorder
[SEAL]

Legislative

Chapter 12 EMPLOYEE DISCHARGE APPEAL BOARD

1-12-1: MEMBERSHIP; MEETINGS APPOINTMENT OF MEMBERS; VACANCIES; TERM OF OFFICE AND RECUSAL:

1-12-2: APPEAL PROCEDURE:

1-12-1: MEMBERSHIP; MEETINGS APPOINTMENT OF MEMBERS; VACANCIES; TERM OF OFFICE AND RECUSAL:

- A. Employee-Membership: The appointed employee discharge appeal board shall consist of five (5) members. ~~Two (2)~~ Three (3) members shall be chosen by and from among the appointive officers and employees of the city other than department heads, ~~one member and two members~~ shall be from senior management and two (2) members shall be members of the city council department heads. The senior management and city council department head members shall be selected by the city manager, with the consent of the city council.
- B. Election Of Employee Representatives Members: At least thirty (30) calendar days prior to the first Tuesday of even numbered calendar years, the city manager shall notify ~~cause~~ all of the appointive officers and full time nonprobationary employees of the city to be notified that anyone interested in being serving on the appeal board must submit his/her name to the city clerk-recorder no later than December 15. During the month of January of even numbered years ~~Thereafter~~, the city manager shall arrange that the appointive officers and full time nonprobationary employees of the city shall vote by secret ballot, from among those employees who applied, for ~~two (2) separate persons~~ three (3) full time nonprobationary employees to serve on the appeal board for a ~~two (2)~~ year term. The vote may be by paper ballot or through electronic means. The city clerk-recorder will count the ballots. The individuals chosen shall then be placed upon an eligibility list to serve on the appeal board. This list shall be in rank order, according to the number of votes received. The two (2) three (3) employees receiving the highest number of votes in the election shall serve as the appointed employee members of the appeal board, unless otherwise. If any employee member becomes disqualified or unable to serve during his/her term, the next highest vote getter would be appointed to the remaining term.
- ~~C.~~ Filling Vacancies: If a vacancy, inability to serve or disqualification occurs on the appeal board within the two (2) year period, that board member shall be replaced by the person receiving the next highest number of votes in the next previous election from the eligibility list.
- ~~D.~~ C. Management Memberships: During the month of January of even numbered years, the city manager, with the consent of the city council, shall designate in writing two (2) of its members and one senior management personnel of the city department heads to serve on the appeal board for a two (2) year terms. The city manager, with the consent of the city council, may also designate from its membership or senior city management one or more department heads as alternate members of the appeal board, who will serve in the absence, inability or disqualification of the a department head member so appointed when designated by the city manager or the appeal board chairperson.

E. **Recusal For Conflict Of Interest:** Any member of the appeal board who is simultaneously employed within the department for which the appealing employee works or who shall be related to the appealing employee through blood, adoption or marriage may not participate as a member of the appeal board considering such appeal. The member so disqualified may be replaced for that appeal, as provided in this section.

F.D. **Compensation:** Members of the appeal board shall receive no compensation for their services; however, said members shall receive their regular city salary and benefits during the time they perform duties on the appeal board. If hearings are conducted after regular business hours, or if a hearing carries over into after regular business hours, the members of the appeal board will be awarded comp time on an hour and one half for an hour basis.

G.E. **Terms:** The terms of the appeal board member shall be for a period of two (2) calendar years, subject to the provisions of sub instead of the regular three (3) year term provided in section 2-1-4C of this code. Otherwise section 2-1-4C shall apply to the appeal board except as expressly provided otherwise by this chapter.

H.E. **Eligibility For Reappointment:** All appeal board members shall be eligible for reappointment or reelection.

I.G. **Quorum; Voting:**

1. The appeal board shall not take any action on any matter, unless a quorum shall be present.

2. Three (3) members of the appeal board in attendance at any meeting shall constitute a quorum; however, at least one elected or senior management department head member must be in attendance in order for a quorum to be present.

3. The appeal board shall not take any action on any matter, unless a quorum shall be present. Three (3) affirmative votes are needed to overturn or affirm a department decision appealed to pending before the appeal board.

4. A member of the appeal board who fails to attend and participate in any part of a hearing on a particular matter may not vote on the decision of the board on that matter.

J.H. **Voting Right; Selecting Chairperson, Training:**

1. All members of the appeal board shall be are voting members.

2. and At a meeting held within 30 business days after being organized, and sooner if required by a pending case, and scheduled by the city manager or a designee, the board shall choose from among their body one member to act as chairperson during that term of the board. The member chosen to act as chairperson shall act to assure the orderly conduct of all proceedings and shall not forfeit any right, duty or privilege, as a result of being chosen to act as chairperson.

I. Within 30 business days following the constitution of the board as provided above, and within 30 business days of any appointment of a replacement member during the term of an appeal board, the city attorney shall provide training to the members of the appeal board as to the powers and requirements of this chapter 12. (2001 Code § 2-6-201; amd. Ord. 10-02, 1-27-2010; Ord. 15-____, 09-09-2015)

1-12-2: APPEAL PROCEDURE:

A. Commencing And Processing An Appeal:

1. An appeal of a discharge, suspension or involuntary transfer within the jurisdiction of the appeal board may be commenced by the affected employee filing written notice of the appeal with the city clerk-recorder within ten (10) working calendar days after the employee receives notice of the final disposition of the city's internal grievance disciplinary procedure or the date when notice of the final decision should have been rendered for disciplinary matters; and within 48 hours after the employee receives notice of being discharged, or involuntarily transferred in a reduction in force.

2. The employee's written notice of appeal must include:

a. The employee's address;

b. The specific reasons for the appeal A detailed challenge to the department head's final decision, including facts and argument why the appeal should be decided in favor of the appealing employee, and citing pertinent law and fact;

c. A copy of the department head's notice of intent to discipline final determination; and

d. A copy of the final disposition of the city's internal grievance procedure or the employee's certification that the time for final disposition has expired and no written decision has been received.

3. The failure of an employee to timely submit this required information shall forfeit any appeal rights of the employee.

4. The department head involved in the matter may not respond to the notice of appeal except as otherwise provided in this section.

35. Upon the filing of the written notice of appeal, the city clerk-recorder shall promptly refer a copy of the notice of appeal to the members of the appeal board and to the department head involved in the matter.

46. Upon receipt of the written notice of appeal, the appeal board shall set a hearing date and provide written notification of the hearing date, including time and place of the hearing to the employee, the employee's department head involved in the matter, the city attorney and the city manager.

57. The city department head involved in the matter must, within ten (10) days of receiving the notice, file with the appeal board a disposition statement setting forth the facts and circumstances supporting the alleged cause of discharge, transfer, or suspension.

a. Within ten (10) business days of receiving the notice of appeal (in appeals of disciplinary matters); or

b. Within 48 hours of receiving the notice of appeal, a disposition statement setting forth the facts and circumstances supporting discharge or involuntary transfer as part of a reduction in force.

The city department head involved in the matter shall mail a copy of the disposition statement to the employee or the employee's designated legal counsel at the address specified in the notice of appeal. No reply to the determination statement by the appellant is permitted.

8. The appeal board, acting through the city clerk-recorder, shall provide notice of the date and time for the appeal hearing in any matter to the department head involved in the matter and to the appellant in writing, which may be by electronic means. The appeal hearing in any matter shall take place no later than 120 business days and no sooner than 90 business days following service of the disposition statement.

9. The city attorney shall arrange for legal counsel to be provided to the appeal board to assist the appeal board in resolving any pre-hearing matters and to advise the appeal board during and after any appeal hearing. This legal counsel shall not be regularly employed by the city attorney's office.

B. Jurisdiction And Authority Of Appeal Board:

1. "At will" employees and employees covered by Utah Code section 10-3-1105(2) or its successor do not have the right to an appeal under this chapter.

2. An employee must exhaust the city's internal grievance disciplinary procedure before commencing an appeal within the jurisdiction of to the appeal board (in appeals for disciplinary matters).

3. The appeal board has jurisdiction to hold a hearing and to take and receive evidence in reviewing *de novo* a final department decision:

- a. To discharge an employee;
- b. To suspend an employee for more than two (2) business days without pay; or
- c. To involuntarily transfer an employee from one position to another with less remuneration.

4. The For appeals of disciplinary matters, the appeal board shall determine only if there was sufficient cause for the discharge, suspension or involuntary transfer of the employee, and whether the discipline assessed was proportional to the offenses charged, including whether the appellant has been disciplined more harshly than other employees recently charged with the same offenses by the department.

5. In appeals of a discharge or involuntary transfer resulting from a reduction in force, the appeal board shall determine if the procedures set out in the employee handbook, or elsewhere, for selecting the employee for discharge or transfer as part of a reduction in force were properly followed by the department head or city manager. The appeal board expressly has no jurisdiction to re-examine the decision to implement a reduction in force or the size and scope of a reduction in force.

6. Subpoenas. The appeal board shall have the power to subpoena witnesses and compel the production of books, papers and any other evidence, as may be pertinent and relevant to any investigation and a fair hearing or decision, in the possession of third parties. Subpoenas must be requested no later than thirty (30) business days following service of the disposition statement.

7. The board may deliberate in a closed session to consider rulings on requests for subpoena, to consider and vote on its decision on the merits following a hearing, and to consider other pre-hearing motions or rulings.

C. Recusal For Conflict Of Interest: Any member of the appeal board who is simultaneously employed within the same department for which the appealing employee works, or who shall be related to the appealing employee through blood, adoption or marriage, may not participate as a member of the appeal board considering such appeal. The member so disqualified may be replaced by an alternate for that appeal, as provided in section 1-12-1B for employee members and in section 1-12-1C for department head members.

CD. Procedure For Conducting Appeal Hearings:

1. Hearing: The hearing shall be held within a reasonable time. The appellant shall serve on the department head involved in the matter its witness list and may serve a request for production of documents within 30 calendar days following service of the disposition statement. The department head involved in the matter shall provide its witness list and any requested documents to appellant, or otherwise respond, within 30 business days following receipt of the appellant's witness list and any request for production of documents.

2. The department head involved in the matter shall arrange for any city employees appearing on appellant's witness list to be available to testify at the hearing.

3. The appeal board will promptly hear and decide any motions in connection with pre-hearing matters, and may adjust the hearing schedule as needed to accommodate the issues of a particular case.

24. Open Hearings: Appeal hearings will be open to the public unless a closed meeting is requested in writing by the appealing employee and consented to by the city department head involved in the matter, or is otherwise permitted by this code.

3. Subpoenas: The appeal board shall have the power to subpoena witnesses and compel the production of books, papers and any other evidence, as may be relevant to any investigation and a fair hearing or decision.

45. Record; Right To Transcript: The appeal board hearings shall be recorded electronically. If a written record or transcript of any proceeding of the appeal board is requested, the party requesting any such record or transcript shall provide for the preparation of such record or transcript, including the payment of all involved costs.

56. Employee's Rights: The employee shall be entitled to appear in person and be heard; be represented by legal counsel duly admitted to the bar of the Utah Supreme Court, at the expense of the employee; have a public hearing; confront the witness whose testimony is to be considered; and examine the evidence to be considered by the appeal board.

67. Burden Of Proof: The employee shall have the burden of proving by a preponderance of the evidence that the city-made department head involved in the matter imposed the discharge, suspension or involuntary transfer without justifiable cause or that the discipline assessed was not proportional to the offenses charged, including whether the appellant has been disciplined more harshly than other employees recently charged with the same offenses by the department.

78. Default: If either party fails to appear and defend or prosecute the action, the appeal board may:

- a. Default the action against the nonappearing party; or
- b. Make its own investigation and determination of the matter in the absence of the defaulting party and enter orders accordingly.

89. Interim And Summary Orders: Upon written request of a party or on its own motion, the appeal board may make such orders as it deems equitable and for good cause shown.

910. Informal Procedure: The appeal board may conduct the hearing informally without following technical or procedural rules regarding the presentation of evidence or witnesses as follows:

The appeal board may permit:

- a. The employee appellant to make an opening statement.
- b. The city to make an opening statement.
- c. The employee city to present evidence and witnesses, subject to cross examination by the city appellant.
- d. The city appellant to present evidence and witnesses, subject to cross examination by the employee city.
- e. Either party The city to present further evidence in rebuttal.
- f. The employee appellant, then the city to make closing arguments.
- g. The employee appellant to make rebuttal argument.
- h. The appeal board may exclude from the hearing any witnesses who have not yet given testimony or evidence in the appeal before the appeal board.
- i. The appeal board is not bound by the rules of evidence followed by the courts and may hear any evidence it determines relevant to the matter.
- j. Every witness shall be first sworn to testify truthfully as provided by law. The oaths are administered at the direction of the appeal board.
- k. The appeal board may modify these procedures at the hearing as may be equitable and conducive to a determination of the issues. The appeal board may declare time limits on the presentation of evidence and argument, provided that the appeal board communicate such time limits in writing to the parties at least 30 business days prior to the commencement of the appeal hearing.

1011. Decision:

- a. Each decision of the appeal board shall be by secret ballot, and certified in writing to the city clerk-recorder within fifteen (15) business days from the date the matter was referred to the appeal board on which the hearing on the merits of an appeal is concluded. If the city and the employee agree, the appeal board may extend the fifteen (15) business day period to a maximum of sixty (60) business days for good cause.

b. Notwithstanding subsection a., appeals filed in connection with a reduction in force must be processed rapidly in the best interests of the employees involved. In such cases the appeal board must report its decision within 24 hours of the end of the hearing.

The appeal board shall prepare written findings of fact and conclusions to support its decision.

If the appeal board finds in favor of the employee, the board shall provide that the employee shall receive, except as may have been previously agreed between the parties:

a. His/her salary for the period of time during which the employee is discharged or suspended without pay; or

b. Any deficiency in salary for the period during which the employee was transferred to a position of less remuneration.

DE. Certify Final Decision To Parties: The city clerk-recorder shall certify written copies of the appeal board's decision to the employee, the department head from whose order the appeal was taken, the city manager and the city attorney within ten (10) business days after receiving the decision.

EE. Court Of Appeals: The final action or decision of the appeal board may be reviewed by the Utah court of appeals in accordance with Utah code section 10-3-1106(6) or any successor provision, and in accordance with the Utah Rules of Appellate Procedure. (2001 Code § 2-6-202; amd. Ord. 10-02, 1-27-2010, Ord. 15-____, 09-09-2015)